United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2039

To be argued by

MARGERY EVANS REIFLER

B
pls

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. CLEVELAND HINES,

Petitioner-Appellant,

-against-

J. E. LaVALLE, Superintendent, Clinton Correctional Facility, Dannemora, New York,

Respondent-Appellee

[APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE

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UNITED STATES COURT OF APPEALS
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[ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF
NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE

Questions Presented

1. Was the pretrial photographic identification of petitioner unnecessarily or impermissively suggestive and if so, did it create a substantial risk of misidentification?

2. Were the statements made by petitioner en route to the police station admissible at trial and if not, did they constitute harmless error only?

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Carter, J.), dated December 26, 1974, which denied petitioner's application for a writ of habeas corpus. The District Court granted petitioner a certificate of probable cause on February 26, 1975.

Facts

Petitioner is presently confined at Green Haven Correctional Facility, Stormville, New York, pursuant to a judgment of conviction rendered by the Supreme Court, County of Bronx, after a trial by jury.* Petitioner was convicted of the crimes of robbery in the first degree, sexual abuse in the first

* At the time this proceeding was commenced, petitioner was at Clinton Correctional Facility, Dannemora, New York.

degree, grand larceny in the third degree, assault in the second degree, and possession of a weapon as a misdemeanor. On December 18, 1972 petitioner was sentenced to concurrent indeterminate terms of imprisonment, the longest of which is eight and one half to twenty-five years (Sullivan, J.).

The judgment of conviction was affirmed by the Appellate Division. People v. Hines, 43 A D 2d 679 (1st Dept. 1973). Leave to appeal to the Court of Appeals was denied on January 16, 1974.

A. The Crime

At approximately 8:30 a.m. on the morning of July 13, 1972, Mrs. Patricia Gareri, a forty-five year old school teacher, parked her car in a lot of the Bronx Botanical Gardens (112-113).* As she exited from the car, a man rushed at her from behind, brandishing a knife. He ordered her to re-enter the car and when she refused, he knocked her to the ground (114). Mrs. Gareri attempted to run away but was again thrown to the ground and forced into the back seat of her car (115-116).

* Unless otherwise indicated, pages in parentheses refer to the state court transcript, submitted as an exhibit on appeal.

The assailant asked Mrs. Gareri if she had any money, admitting that he needed it for dope (117-118). He took twenty dollars, a watch, and two rings from Mrs. Gareri. The man directed Mrs. Gareri to keep quiet and forced her to remove her stockings and underpants (118-119, 154). Holding her head down and spreading her legs, the man sexually assaulted her (119-121). The entire incident last forty-five minutes (124).

During the incident, the assailant was involved in conversation with Mrs. Gareri and told her that he was married for eleven years and had two children (120). He demanded identification from Mrs. Gareri and told her that his Black Muslin friends would "take care" of her and her family if she went to the police (123).

The victim immediately drove to the gatehouse at the exit of the parking lot and reported what had happened to the guard (128), including a detailed description of her attacker (135-136). The police arrived approximately twenty minutes later and Mrs. Gareri reported what had happened and gave them a detailed description (128, 152-153).

On the following day Mrs. Gareri unsuccessfully examined hundreds of photographs at the stationhouse (29). On July 18, she was informed by Lieutenant Mitchell that a man meeting the description that she had given had been arrested (25-26, 30, 162). Two days later she met the lieutenant outside of Fordham Hospital. After examining eleven of fourteen photographs which he handed to her, she immediately selected the picture of petitioner (14-20).

B. Pretrial Identification

Petitioner moved to suppress Mrs. Gareri's identification. The hearing was held before the trial court on November 13, 1972. At the request of the People, the Court agreed to conduct a two stage identification hearing, to determine if the out-of-court identification was unnecessarily suggestive and if so, whether the in-court identification was tainted. The motion to suppress the identification was denied at the close of the first stage of the hearing.

Mrs. Gareri testified that she had unsuccessfully examined hundreds of photographs at the stationhouse on the day of after the attack (29). Mrs. Gareri had told the police that her assailant wore a hat and she believed that some of the of the photographs were of men wearing hats (31-33). On September 18, Mrs. Gareri was informed by Lieutenant Mitchell that the police had arrested someone who met the description she had given (25-26, 30, 36).

On September 20, Mrs. Gareri and her husband met Lieutenant Mitchell in a police car outside of Fordham Hospital (14-15). Lieutenant Mitchell asked her to look through the fourteen or fifteen photographs and see if she could identify her attacker; the lieutenant said no more than that (16). Mrs. Gareri looked at eleven photographs and then stopped when she reached the petitioner's, stating "that's the man. That's the one that raped me" (18-19). She did not look at any photographs after identifying petitioner's (19) nor did she pick any other photograph (35). Petitioner's was the only photograph of a man wearing a hat (31-32, 34). The pictures were submitted to the Court as evidence; they were all of Black or Puerto Rican men of a similar

age group; all had facial hair (47). The lieutenant had not said anything suggestive to Mrs. Gareri while she viewed the photographs nor did he state that petitioner's photograph was in the group given to her (16, 19-20, 35). Mrs. Gareri positively identified petitioner and his photograph at the hearing (14, 18). No witnesses were called by the defense.

The trial court found that at least twelve photographs were made available to Mrs. Gareri by Lieutenant Mitchell. The Court denied the motion to suppress the identification, holding that the photographic identification hearing was not so suggestive as to give rise a very substantial likelihood of irreparable identification (49).

C. Identification Testimony at Trial

Mrs. Gareri testified at trial that she had viewed petitioner at close range for forty-five mintues (124, 126). Mrs. Gareri had both the opportunity and motivation to observe petitioner; indeed, she testified that she looked at his face because "I wanted to be sure to remember it so I could identify him at a future date (126). Mrs. Gareri had a "good, clear look"

at petitioner's face and nothing interfered with her ability to see his face (131). She positively identified petitioner in court (115, 131) and stated "I'll never forget that face. Of course, I'm sure" (131).

Mrs. Gareri immediately reported the incident to the Botanical Gardens Guard and then the police; she gave both a detailed description of the assailant (127-129, 135-136, 152-153). She described petitioner as 145 pounds, 5'8", between thirty and forty years old, dark skinned, with a goatee and mustache, black hair, and dark brown eyes (136). There was no testimony rebutting this description of petitioner. She described his clothes in minute detail (135). The lapse of time between the rape and Mrs. Gareri's positive identification of petitioner's photograph was one week. No witnesses were called by the defense.

D. Pretrial Huntley Hearing

Petitioner also moved to suppress certain statements which he had made to Lieutenant Mitchell after his arrest. The Huntley hearing was held immediately after the identification hearing, and the motion was denied.

Lieutenant Mitchell testified that he arrested petitioner at approximately 1:00 p.m., on July 18, 1972 in the Bronx Botanical Gardens (51). Petitioner was taken by police car to the precinct. During the course of the five minute ride (55), the lieutenant initiated a general conversation (52, 65), "just to have something to say en route to the station-house" (65). He asked the petitioner his name, where he lived, his age, marital status, and if he had children, "just general questions" (52-53). Petitioner stated, inter alia, that he had been married for eleven years and that he had two children (53). Petitioner had not received Miranda warnings at the time this conversation took place (66). No witnesses were called by the defense.

The trial court ruled that the information given by petitioner amounted to a "'pedigree statement', much like what is encountered in booking procedures" and that such a statement was outside the perimeter of Miranda (77-78). Accordingly, the motion to suppress the statements was denied (78).

E. The Trial

Mrs. Gareri, the Botanical Gardens guard, Lieutenant Mitchell, and the doctor who examined Mrs. Gareri testified for the People. Petitioner's defense consisted of the testimony of his wife and Edward Spencer, a neighbor. Petitioner's wife testified that he was home on the morning of July 13; that they arose at 8:00 a.m.; that petitioner did not go out of the building to walk the dog because it was raining; and that petitioner talked to Mr. Spencer in the hallway about the ballgame that had been rained out and returned to the apartment at 9:00 a.m. (255-256). Mr. Spencer testified that he spoke to petitioner around 9:00 a.m., on July 13 regarding the Mets game and whether or not it would be rained out (359-385).

On rebuttal, the People called a United States Weather Bureau employee who testified that it did not start to rain until 9:50 a.m. on July 13 (401-404). An Assistant Public Relations Director of the Mets testified that there was no Mets game scheduled, rescheduled, or played on July 13 (405-407).

F. District Court Proceedings

Petitioner sought habeas corpus relief in the District Court, challenging the admissibility at trial of the statements which he gave before he received his Miranda warnings and the legality of the identification procedure.*

The Court characterized petitioner's statements to Lieutenant Mitchell as "pedigree" statements whose subject matter was not within petitioner's exclusive knowledge. Adopting the position of the Fifth Circuit in Farley v. United States, 381 F. 2d 357, 359 (5th Cir.), cert. den. 389 U.S. 942 (1967), the Court held that it was not error to admit the statements, even though no Miranda warnings had been given.

Noting that the state court had found that the photographic procedure was not suggestive, the Court stated that petitioner had apparently failed to show by "convincing evidence" that this finding, presumed correct, was erroneous. The Court then examined the facts of the case to determine, in any event, if the pretrial identification was conducive to irreparable misidentification. After examining the factors set

* Petitioner's claims were exhausted in the state court on his direct appeal.

forth in Neil v. Biggers, 409 U.S. 188 (1972), the Court found that:

> "'there was already such a definite image [of her assailant] in the witness' mind' that Mrs. Gareri's in-court identification of petitioner was reliable, whether or not the pretrial procedure was 'unnecessarily' or 'impermissibly' suggestive." (Opinion at 17).

Petitioner's argument that he was entitled to counsel at the pretrial photographic identification was rejected on the authority of United States v. Ash, 413 U.S. 300, 321 (1973).*

POINT I

THE PRETRIAL PHOTOGRAPHIC IDENTIFICATION PROCEDURE WAS NOT UNNECESSARILY OR IMPERMISSIBLY SUGGESTIVE AND IN ANY EVENT, DID NOT CREATE A SUBSTANTIAL RISK OF MISIDENTIFICATION.

In United States ex rel. Phipps v. Follette, 428 F. 2d 912 (2d Cir.), cert. den. 400 U.S. 908 (1970), this Court established an two-pronged inquiry for determining a claim of unconstitutional identification procedure. The first question is whether the pretrial identification procedure was unnecessarily or impermissibly suggestive. If it is found to have been so, the court must then inquire as to whether or not the procedure was so conducive to irreparable mistaken identification that allowing an in-court identification would be a denial of due process. Id. at 914-15. See also United States v. Evans, 484 F. 2d 1178, 1184-85 (2d Cir. 1973).

* This claim is not pursued on appeal.

As to the first question the trial court specifically found that the photographic identification of petitioner was not suggestive, a determination the District Court found adequate (Opinion at 10). Accordingly, the state court finding is presumed to be correct, and petitioner has the burden of establishing that it was erroneous by convincing evidence. 28 U.S.C. § 2254(d); LaVallee v. Delle Rose, 410 U.S. 690, 695 (1973). See United States ex rel. Phipps v. Follette, supra, at 915-16.

Although the District Court suggested that the photographic identification was unnecessary (but see United States v. Boston, 508 F. 2d 1171, 1176 [2d Cir. 1974]) and may have been suggestive,* it stated that:

> "It would appear that petitioner has failed to show by 'convincing evidence' that the trial judge erred in his conclusion that the pretrial identification was not impermissibly suggestive." Opinion at 14.

In accordance with the usual procedure in this Circuit, the Court nonetheless examined the facts to determine if the identification was so conducive to irreparable mistaken identification that due process was violated. The Court held that "there is virtually no doubt that Mrs. Gareri's in-court identification

* Respondent disagrees with the Court's suggestions. However, since it is so clear that the pretrial identification did not taint the in-court identification, argument will be focused on the latter issue.

of petitioner at trial was based on a reliable, independent recollection, rather than on the photograph of petitioner." Opinion at 14.

In determining if the identification is reliable even though the photographic procedure was suggestive, the test is the totality of circumstances and each case must be decided on its own facts. E.g. Neil v. Biggers, 409 U.S. 188, 199 (1972); Simmons v. United States, 390 U.S. 377, 384 (1968); United States v. Messina, 507 F. 2d 73, 75-76 (2d Cir. 1974). The factors to be examined were set forth by the Supreme Court in Neil v. Biggers, 409 U.S. 188, 199 (1972):

> "...the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

See United States ex rel. Phipps v. Follette, supra, at 915.

Considering each of these factors, it is a certainty that Mrs. Gareri's in-court identification of petitioner was based on a reliable, independent recollection. Mrs. Gareri testified that she viewed petitioner in the daylight at close range for forty-five minutes. She had a clear look at petitioner's face and nothing obstructed her vision. She was highly motivated to remember petitioner. As a rape victim,

"[s]he was no casual observer, but rather the victim of one of the most personally humilitating of all crimes". Neil v. Biggers, supra, at 200. Indeed, Mrs. Gareri testified that she looked at his face because "I wanted to be sure to remember it so I could identify it at a future date" (126).

Mrs. Gareri's description of petitioner was thorough and precise. She gave both the Botanical Gardens guard and the police a description which included his skin color, height, weight, age, eye and hair color, and hirsute characteristics. In addition she was able to minutely describe the color, design, and style of his clothes and hat.* See United States ex rel. Valentine v. Zelker, 446 F. 2d 857, 859 (2d Cir. 1971). There was no rebuttal of this description of petitioner at trial. Only

* Despite all these details, petitioner asserts that the description was "general". Respondent refers him to Justice Powell's statement regarding the description given by the rape victim in Neil v. Biggers, supra, at 200:

> "Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough."

See also United States ex rel. Gonzalez v. Zelker, 477 F. 2d 797, 801-802 and n. 4 (2d Cir.), cert. den. 414 U.S. 924 (1973).

The suggestion that Mrs. Gareri's identification was unreliable because she had no demonstrable expertise for recalling details of a person's appearance is frivolous. It can hardly be required that individuals develop such an expertise in the expectation that they may be rape victims in the future.

one week later (See United States ex rel. Bisordi v. LaVallee, 461 F. 2d 1020, 1024 [2d Cir. 1972]), she immediately and positively selected petitioner's photograph from a group of fourteen pictures, with no suggestion by the police. See, e.g., United States ex rel. Bisordi v. LaVallee, supra, at 1024; United States ex rel. Phipps v. Follette, supra, at 915.

Mrs. Gareri made a positive in-court identification of petitioner, stating that "I'll never forget that face". See Neil v. Biggers, supra, at 201. The possibility of misidentification is lessened by cross examination at trial. Simmons v. United States, supra, at 384. See United States ex rel. John v. Casscles, 489 F. 2d 20, 26 (2d Cir. 1973), cert. den. 416 U.S. 959 (1974). Mrs. Gareri was exhaustively cross examined and her testimony was unshaken. See, e.g., United States ex rel. Gonzalez v. Zelker, supra, at 802; United States ex rel. Bisordi v. LaVallee, supra, at 1026. Given these circumstances there was no possibility that the pretrial identification procedure gave rise to a very substantial liklihood of irreparable misidentification.* As the District Court, held:

* Petitioner also contends that Mrs. Gareri's observation of him at the preliminary hearing and her review of the photographs prior to trial contributed to the risk of misidentification. See, Baker v. Hocker, 496 F. 2d 615 (9th Cir. 1974); United States v. Davis, 487 F. 2d 112, 122 (5th Cir.), reh. den., 486 F. 2d 1403 (1973), cert. den. 415 U.S. 981, reh. den. 416 U.S. 975 (1974). The factors outlined above negate any assumption that Mrs. Gareri's identification was based on anything other than the definite image formed in her mind at the time of the rape. See also United States v. Matlock, 491 F. 2d 504, 506 (2d Cir. 1974),

"there was already such a definite image [of her assailant] in the witness' mind that Mrs. Gareri's in-court identification of petitioner was reliable, whether or not the pretrial procedure was 'unnecessarily' or 'impermissibly' suggestive." Opinion at 17.

POINT II

THE STATEMENTS MADE BY PETITIONER TO THE POLICE EN ROUTE TO THE PRECINCT WERE ADMISSIBLE AT TRIAL AND IF INADMISSIBLE, CONSTITUTED HARMLESS ERROR ONLY

A.

Petitioner contends that his statements to Lieutenant Mitchell en route to the stationhouse were improperly admitted at trial because he had not yet received his Miranda warnings. In response to questions initiated by the lieutenant to "pass the time", petitioner stated that he had been married for eleven years and had two children. These statements corroborated the testimony of Mrs. Gareri, who stated that petitioner had given her the same information during the attack.

Both the state court and the District Court correctly characterized these responses as "pedigree statements" similar to those obtained during a police booking procedure. The information obtained during such routine questioning is necessary for police identification of suspects and is not within petitioner's

exclusive knowledge since it could easily be obtained by routine police investigation. Moreover, it is not the product of the type of questioning which the Supreme Court sought to prevent in Miranda v. Arizona, 384 U.S. 436 (1966).

With only one exception, the courts have uniformly held that such statement are admissible, despite the absence of Miranda warnings. In Farley v. United States, 381 F. 2d 357 (5th Cir.), cert. den. 389 U.S. 942 (1967), a defendant refused to speak after being given his Miranda warnings. A postal inspector than asked for his address and this information was introduced by the Government at trial. The Court refused to hold these statement inadmissble. Noting that his address was not within his exclusive knowledge, the Court stated that these was no evidence of any "oppressive or overbearing circumstances" and that it would be unreasonable to apply Miranda in this situation. Id. at 359.

In United States v. LaMonica, 472 F. 2d 580 (9th Cir. 1972), a defendant was not interrogated after being given his Miranda warnings and stating that he did not wish to be questioned. During a routine inventory of his personal property, however, a customs official inquired into the nature of a slip of paper. The Court held that there was no error in admitting the defendant's response. Noting that there was no persistent or coercive

questioning, trickery, or isolation from counsel, the Court stated that this was not a case in which the defendant was questioned for the purpose of eliciting an incriminating statement. Id. at 581. See also, e.g., United States v. Menichino, 497 F. 2d 935, 941 (5th Cir. 1974); United States v. Jones, 457 F. 2d 697, 699 (5th Cir. 1972); People v. Ryff, 27 N Y 2d 707, 314 N.Y.S. 2d 17 (1970); People v. Rivera, 26 N Y 2d 304, 309 (1970), 310 N.Y.S. 2d 287, (1970); State v. Idaho, 92 Idaho 731, 736, 449 P. 2d 837, 842 (1969); Clarke v. State, 3 Md. App. 447, 240 A. 2d 291, 294 (Ct. Spec. App. 1968); People v. Hernandez, 263 Cal. App. 2d 242, 69 Cal. Rptr. 448, 455 (Ct. of App. 1968); Elsen & Rosett, Protections for the Suspect under Miranda v. Arizona, 67 Col. L. Rev. 645, 662 (1967).

The only case which has held to the contrary is Proctor v. United States, 404 F. 2d 819 (D.C. Cir. 1968). In that case a defendant was asked his employment by a policeman filling out a lineup form. The Court held that his response was inadmissible. Id. at 820. Relying on the portion of Mallory v. United States,

354 U.S. 449, 454 (1957), which stated that a person may be booked but not subjected to a process of inquiry which lends itself to eliciting statements which support his guilt, the District of Columbia Circuit reasoned that "even innocent questions asked of a suspect in the inherently coercive atmosphere of the police station may create in him the impression that he must answer them". 404 F. 2d at 821.

The Proctor Court's reasoning and holding are unsound. Questioning for biographical data does not lend itself to eliciting damaging statements but is a rather a straightforward attempt to compile booking information to identify the suspect; it is not related to questioning about criminal activity, United States v. Menichino, supra at 941; People v. Rivera, 26 N.Y. at 309; Clarke v. State, 240 A. 2d at 294. The Miranda Court specifically recognized the burdens of law enforcement officials and the necessity of giving ample latitude to law enforcement agencies in the legitimate exercise of their duties. 384 U.S. at 481. As one court has stated:

> "....we note that booking questions have value to the criminal process independent of any tendency to uncover admissions. The police have a

> legitimate interest in orderly records identifying the names, addresss, and places of employment of those arrested". State v. Smith, 203 N.W. 2d 348, 351 (Sup. Ct. Minn. 1972).

Moreover, the assumption by the Proctor court that Miranda is intended to cover such routine questioning has been rejected by every other court which has considered the issue. Miranda was concerned with interrogation which has as its goal the connection of a suspect with the commission of a crime; the ultimate purpose of the case is to prevent interrogation which will result in overbearing the will of the suspect. Clarke v. State, supra at 294. See also United States v. LaMonica, supra, at 581. Absent any intent to elicit incriminating statements or any element of coercion or trickery, there is no basis for the assumption that routine questioning is inherently coercive and therefore that statements so elicited are involuntary under Miranda. As the Ninth Circuit stated in United States v. LaMonica, supra at 580:

> "This is not a case in which a suspect was interrogated for the purpose of eliciting an incriminating statement. LaMonica was not deliberately isolated from counsel...pressed with persistent or coercive interrogation....[or subjected to] guile or trickery to induce a confession". (citations omitted).

* * *

"The Fifth & Sixth Amendments are intended to protect the individual from governmental overreaching. There was no such overreaching in this case."

This is exactly the situation presented herein. Petitioner was asked routine questions during the course of a conversation en route to the precinct, similar to those asked at booking. There was no persistent or coercive questioning or resort to force. More importantly, he was not being interrogated for the purpose of eliciting incriminating information. Compare Williams v. Brewer, 509 F. 2d 227, 229-230, 234 (8th Cir. 1974). At the time that Lieutenant Mitchell questioned petitioner, he was unaware that Mrs. Gareri had reported that her assailant had given information concerning his marital status and children (226). The only information which the lieutenant possessed was a description of the suspect (211). The lieutenant did not learn of petitioner's statements to Mrs. Gareri until after the arrest (200, 202, 222, 225-226).

B.

Assuming arguendo that petitioner's statements to Lieutenant Mitchell should not have been admitted at trial, their admission was no more than harmless error. See Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967). The evidence in this case was overwhelming. Mrs. Gareri's testimony and identification were clear and unwavering (ante at 7-8,14-16). Petitioner met her description and was apprehended in the vicinity of the attack. Mrs. Gareri's injuries were corroborated by medical testimony. Petitioner's only defense was an attempt to establish an alibi, an attempt which failed miserably when it was explicitly rebutted. There can be no doubt that the jury would have reached the same verdict in the absence of the challenged statements. As the Supreme Court stated in Milton v. Wainwright, 407 U.S. 371, 377 (1972), "we do not shut our eyes to the reality of overwhelming evidence of guilt fairly established in the state court".

Since it is manifest that the jury would have reached no other verdict than that rendered, the admission of the statements was harmless error and constituted no violation of petitioner's federally protected rights.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED

Dated: New York, New York
May 22 , 1975

Respectfully submitted,

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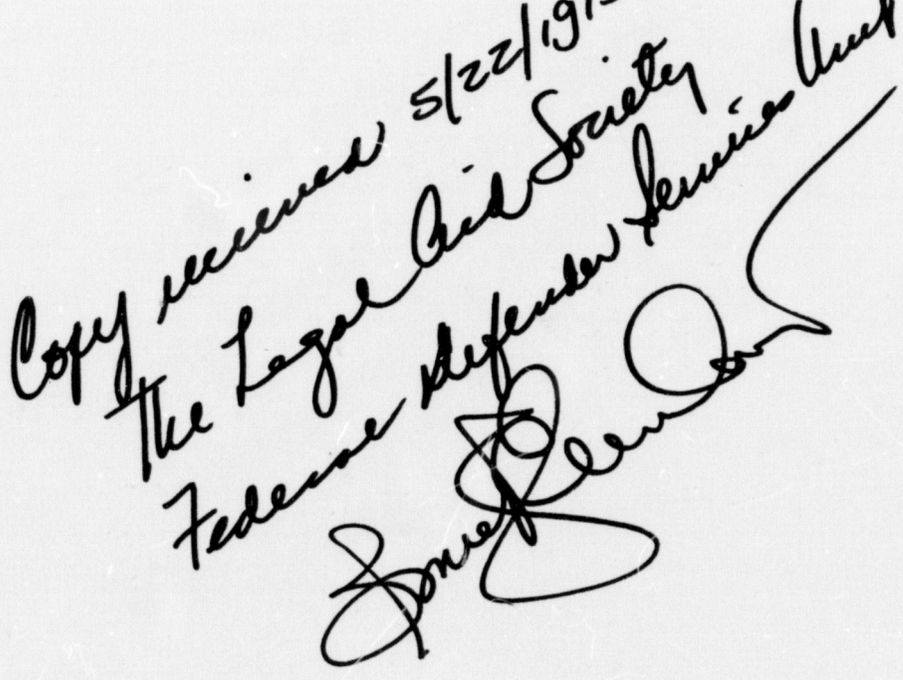
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